Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

THE SHIPPING CORPORATION OF INDIA, LTD.

Petitioner,

v.

JALDHI OVERSEAS PTE LTD.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

JEREMY J O HARWOOD
BLANK ROME LLP
405 Lexington Avenue
New York, NY 10174
(212) 885-5000

Counsel for Petitioner
The Shipping Corporation of India, Ltd

QUESTIONS PRESENTED

1. Whether attachments under Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure of electronic funds transfers ("EFTs") are precluded by New York State law, specifically §§ 4-A-502(4) & -503 of the New York Uniform Commercial Code?

2. Whether in order to maintain uniform rules relating to maritime matters, which was the fundamental purpose of certain provisions in the Constitution, conflicting provisions of State law that work material prejudice to the attachment remedy are invalid to that extent?

3. Whether no State, through its enactment of the Uniform Commercial Code, can purport to restrict or define "intangible" property subject to maritime attachment?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the parties below are listed in the caption.

In addition, The Clearing House Association L.L.C. filed a motion to appear and submit a brief, as *amicus curiae*, which was granted at the time of the decision under review.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioner states as follows:

It is majority owned by the government of India with shares listed on the Bombay Stock Exchange Ltd., Mumbai; The National Stock Exchange of India Ltd., Mumbai; The Calcutta Stock Exchange Associated Ltd., Kolkata; The Delhi Stock Exchange Association, Ltd., New Delhi; and Madras Stock Exchange Ltd., Chennai, India.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *The Shipping Corporation of India Ltd. v. Jaldhi Overseas Pte, Ltd.*, 585 F.3d 58 (2d Cir. 2009) and is reprinted in the Appendix to the Petition ("Pet. App.") at A. The opinion of the United States District Court for the Southern District of New York ("District Court") is an unpublished decision that is available at 2008 U.S. Dist. LEXIS 49209 (S.D.N.Y. Jun. 27, 2008) and 2008 WL 2596229 (S.D.N.Y. Jun. 27, 2008) and reprinted at Pet. App. B ("Vacatur Order"). The Vacatur Order was based entirely on the District Court's prior opinion in *Seamar Shipping Corp. v. Kremikovtzi Trade Ltd.*, 461 F. Supp. 2d 222 (S.D.N.Y. 2006), which is reprinted at Pet. App. C.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit (the "Court of Appeals" or "Second Circuit") was entered on October 16, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

U.S. Const. art. I, § 8, cl. 3:

> Section 8. The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

* * *

U.S. Const. art. III, § 1:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may ordain and establish.

* * *

U.S. Const. art. III, § 2:

Section 2. The judicial Power shall extend to all Cases in Law and Equity . . . to all Cases of admiralty or maritime Jurisdiction. . . .

* * *

U.S. Const. art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATUTES:

Rule B(1) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure ("Rule B" and "Admiralty Rules," respectively), Pet. App. D:

> (1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. In an in personam action:
>
> > (a) If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property--up to the amount sued for--in the hands of garnishees named in the process.
> >
> > (b) The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district. The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of attachment and garnishment. The clerk may issue supplemental process

enforcing the court's order upon application without further court order.

(c) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must issue the summons and process of attachment and garnishment. The plaintiff has the burden in any post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed.

(d) (i) If the property is a vessel or tangible property on board a vessel, the summons, process, and any supplemental process must be delivered to the marshal for service.

(ii) If the property is other tangible or intangible property, the summons, process, and any supplemental process must be delivered to a person or organization authorized to serve it, who may be (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States.

(e) The plaintiff may invoke state-law remedies under Rule 64 for seizure

> of person or property for the purpose of securing satisfaction of the judgment.

Sections 4-A-502(4) and 4-A-503 of the New York Uniform Commercial Code ("N.Y.U.C.C."), Pet. App. D:

> Creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer may be served only on the beneficiary's bank with respect to the debt owed by that bank to the beneficiary. Any other bank served with the creditor process is not obliged to act with respect to the process.
>
> [and]
>
> For proper cause and in compliance with applicable law, a court may restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment order of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.

STATEMENT OF THE CASE

A. Background: Rule B And The Attachability Of "Intangible" Property

The importance of maritime attachment and its vital historical purposes have long been recognized by this Court. *See Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, 490 (1825); *see also Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684, 693, 698 (1950); *In re Louisville Underwriters*, 134 U.S. 488, 490 (1890); *Atkins v. The Disintegrating Co.*, 85 U.S. (18 Wall.) 272 (1874).

In *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne De Navigation*, 605 F.2d 648, 655 (2d Cir. 1979), the Second Circuit stated:

> Because the perpetrators of maritime injury are likely to be peripatetic, *Ex Parte Louisville Underwriters*, 134 U.S. 488, 493, 10 S. Ct. 587, 33 L. Ed. 991 (1890), and since the constitutional power of the federal courts is separately derived in admiralty, U.S. Constitution Art. III § 2, suits under admiralty jurisdiction involve separate policies to some extent. This tradition suggests not only that jurisdiction by attachment of property should be accorded special deference in the admiralty context, but also that maritime actors must reasonably expect to be sued where their property may be found.

Id. (emphasis added).

Rule B(1)(a) permits "a prayer for process to attach the defendant's tangible or intangible property," where the conditions for that remedy exist. The quandary confronting U.S. Courts in the modern era, as well as the standard by which the Courts should fashion relief under Rule B, was aptly described by the District Court in *Yayasan Sabah Dua Shipping SDN BHD v. Scandinavian Liquid Carriers Ltd.*, 335 F. Supp. 441, 449 (S.D.N.Y. 2004):

> In this wired age, the location of an intangible, especially a bank account, is a metaphysical question. By and large, bank deposits exist as electronic impulses embedded in silicone chips. In a sense, therefore, bank funds are both everywhere and nowhere. But the problem is not a new one. Before the advent of electronic banking, courts grappled with the dilemma of pinpointing the location of intangible assets. It is a dilemma that calls for a practical judgment. As Judge Cardozo so eloquently put it in *Severnoe Securities v. London & Lancashire Inc.* [255 N.Y. 120, 123-24, 174 N.E. 299, 300 (1931)]:
>
> "The situs of intangibles is in truth a legal fiction, there are times when justice and convenience requires that a legal situs be ascribed to them . . . [citations omitted] . . . At the root of the selection is generally a common sense appraisal of the requirements of justice

> and convenience of particular conditions."

Id. (emphasis added).

The Second Circuit's decision in *United States v. Daccarett*, 6 F 3d. 37 (2d Cir. 1993), left no doubt that an EFT is an attachable *res*. *Daccarett* was an *in rem* forfeiture case, initiated under Rule C of the Admiralty Rules. There was, however, no occasion for the court there to consider who owned the funds because it involved an *in rem* proceeding. *Daccarett* did, however, helpfully clarify the juridical nature of an EFT:

> The claimants' conception of the intermediary banks as messengers who never hold the goods, but only pass the word along, is inaccurate. On receipt of the EFTs from the originating banks, the intermediary banks possess the funds, in the form of bank credits, for some period of time before transferring them on to the destination banks. While claimants would have us believe that modern technology moved the funds from the originating banks through the intermediary bank to their ultimate destination without stopping, that was not the case. With each EFT at least two separate transactions occurred: first, funds moved from the originating bank to the intermediary bank; then the intermediary bank was to transfer the funds to the destination bank, a correspondent bank in

> Colombia. While the two transactions can occur almost instantaneously, sometimes they are separated by several days. Each of the amounts at issue was seized at the intermediary bank after the first transaction had concluded and before the second had begun.

Id. at 54 (emphasis added).

Accordingly, "an EFT while it takes the form of a bank credit at an intermediary bank, is clearly a seizable *res* under the forfeiture statutes." *Id.* at 55. As *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263, 277 n. 11 (2d Cir. 2002) noted in relying on *Daccarett*, although the reference to the Admiralty Rules was subsequently deleted from 28 U.S.C. § 881(b) the "statutory restructuring does not alter the substantive reality that admiralty practice as expressed by the Admiralty Rules is incorporated into the drug civil forfeiture statute." *See also United States v. All Assets*, 571 F. Supp. 2d 1, 15-17 (D.D.C. 2008) (discussing use and role of Admiralty Rules in asset forfeiture actions). *Daccarett* has not been overturned and stands for a clear proposition, under Admiralty Rule C, of the attachability of an EFT "after the first transaction ha[s] concluded." An EFT's nature as a credit (necessarily held for someone's account) is therefore comparable to the nature of a bank account, which does not contain the depositor's cash but merely represents the bank's promise to pay the depositor, *i.e.* a credit. *Citizen's Bank of Md. v. Strumpf*, 516 U.S. 16 (1995); *United*

States v. Butterword-Judson Corp., 267 U.S. 387 (1925).[1]

B. The *Winter Storm* Rule

The District Court's Vacatur Order was directly contrary to the controlling law in the Second Circuit, at that time, that permitted maritime attachment of EFTs, whether "to or from" a Rule B defendant. *Winter Storm Shipping, Ltd. v. TPI*, 310 F. 3d 263, 278-79 (2d Cir. 2002) (the "*Winter Storm* Rule"). The *Winter Storm* Rule was premised on the language of "Rule B itself, which provides that a maritime plaintiff may 'attach the defendant's tangible or intangible personal property'". *Id.* at 276 (quoting Rule B). *Winter Storm* held that "[b]ecause that rule is derived from federal law, there is no occasion to look for guidance in state law," and, in any event, "this provision of the [New York] U.C.C. cannot abrogate Winter Storm's right to a maritime attachment." *Id.* at 278 (emphasis added). *See also Bank of New York v. Nickel*, 14 A.D. 3d 140, 146-47, 789 N.Y.S.2d 95, 100 (1st Dep't 2004) ("While

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[1] *See also* Joseph H. Sommer, *Where is the Economic Analysis of Payment Law?*, 83 Chi.-Kent L. Rev. 751, 754 (2008) ("Privity is potent in payment law, because most payment systems are built on contract. Payment systems rely on bank money; bank money relies on bank deposits; bank deposits are debt obligations; debt is contract. Payment transactions are built from these contractual units. A single account-based payment involves the two end parties, their banks, maybe some intermediaries, and perhaps some communications firms. Privity orders this complexity into simple pairwise relationships' between account holders and their banks, between banks, or between senders and their communications providers. U.C.C. Articles 4A and 8 are dominated by privity; it is very difficult to bring a claim outside the privity chain.").

promulgating its regulations, and defining interests in property, OFAC [Office of Foreign Assets Control] did not apply the UCC and was not limited by concepts of title under state law."). We submit that *Winter Storm* was correctly decided and should be reinstated by this Court.

The *amicus* briefs of The Clearing House Association L.L.C. ("Clearing House Association") and the Federal Reserve Bank of New York urging application of provisions of and commentary to the N.Y.U.C.C. to "abrogate" Rule B were rejected in *Winter Storm*.

In *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434 (2d Cir. 2006) and *Consub Delaware LLC v. Schahin Engenharia Ltda.*, 543 F.3d 104 (2d Cir. 2008) the Second Circuit had two further opportunities to consider the Clearing House Association's arguments that the *Winter Storm* Rule had caused its members substantial administrative burdens and "could, if left uncorrected, discourage dollar-denominated transactions and damage New York's standing as an international financial center," Pet. App. 7a.[2] On both occasions the Second Circuit again refused to pre-empt Rule B by application of the N.Y.U.C.C. or accept that its application to EFTs had any of the dire and "significant" "unforeseen consequences" raised by the *amicus*.

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[2] Citing, *e.g.*, Lawrence W. Newman & David Zoskowsky, *Is There Finally a Backlash Against Rule B Attachments?*, Permanent Editorial Bd for the Uniform Commercial Code, PE Commentary 6, 241 N Y L J 3 (2009)

Indeed, only a year earlier, in *Consub Delaware*, the court had stated:

> There has been no decision by an en banc panel overruling *Winter Storm*. Moreover, there is no justification for departing from the principle of *stare decisis* here where [defendant] has not shown that *Winter Storm* is unworkable, and where admiralty jurisdiction is the subject of congressional legislation and Congress remains free to alter the *Winter Storm* rule. In any event, *Winter Storm* was correctly decided.

Consub Del., 543 F.3d at 109 (emphasis added).

Those three Second Circuit decisions followed a long line of authority from this Court rejecting application of State law to affect maritime issues, as discussed below.

C. The Decisions Below

The Shipping Corporation of India ("SCI") filed its Rule B action against Jaldhi Overseas Pte Ltd. ("Jaldhi") in the District Court to obtain security for its claims in London arbitration arising from a breach of charter party. SCI asserted, and states for the purposes of Rule 14(g)(ii), the District Court's admiralty or maritime jurisdiction under 28 U.S.C. § 1333, as well as subject matter jurisdiction under 9 U.S.C. § 8. SCI subsequently attached EFTs in the sum of $4,873,404.90, of which $4,590,678.60 were transmitted by third parties to Jaldhi, as

"beneficiary" (the "Beneficiary EFTs"). The balance were "originator" EFTs. Pet. App. 14a.

Jaldhi moved under Supplemental Rule E of the Admiralty Rules solely to vacate the Beneficiary EFTs. The District Court granted Jaldhi's motion based on its prior decision in *Seamar Shipping Corp. v. Kremikovtzi Trade Ltd.*, 461 F. Supp. 2d 222 (S.D.N.Y. 2006), *see* Pet. App. 33a, which vacated attachment of EFTs of which the defendant was a beneficiary. All other District Court judges in the Second Circuit that had considered the issue had followed the *Winter Storm* Rule.[3]

In *Seamar* the District Court had relied, *inter alia*, on the "absence of a federal rule governing whether an EFT is the property of an intended beneficiary while in transit" so as to apply N.Y. U.C.C. § 4-A-502 *cmt. 4.* Pet. App. 44a. Pursuant to such State law, the *Seamar* court ruled that a Rule B defendant has "no property interest" in a beneficiary EFT as required by Rule B(1)(a). Pet. App. 44a. The Vacatur Order adopted that reasoning. Pet. App. 33a ("EFTs directed by third parties to a defendant do not become the defendant's property until the transfer is completed" (citing *Seamar*)).

The District Court, recognized that the precise issue was *sub judice* because of the pending appeal in *Consub Delaware* and stayed the Vacatur Order for

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[3] *See Cia. Sudamericana de Vapores S.A. v Sinochem Tianjin Co*, 2007 WL 1002265, *3 (S D N Y. Apr. 4, 2007) ("the parties agree that every decision in this District except *Seamar Shipping* holds that defendants who are beneficiaries of an EFT in the hands of intermediary banks have a sufficient property interest for attachment under Rule B(1)(a)")

ninety days pending a decision in that appeal. That stay was further extended by a temporary stay order of the Court of Appeals.

On appeal neither party questioned the *Winter Storm* Rule. Jaldhi only questioned whether the rule, as interpreted by *Aqua Stoli*, 460 F.3d at 435, extended to EFTs from third parties directed to the Rule B defendant, as beneficiary.[4] Pet. App. 3a-4a ("Specifically, the appeal raises the issue of whether EFTs of which defendants are the beneficiary are attachable property . . .").

Nonetheless, the Court of Appeals considered that it was "now presented with the question of whether the rule in *Winter Storm* should be reconsidered and, upon reconsideration, overruled." Pet. App. 4a. Neither party had raised or briefed that issue. The Clearing House Association, which had raised the issue as *amicus* in *Aqua Stoli* and in *Consub Delaware*, had filed a tardy motion in February 2009 (briefing was completed in December 2008) seeking leave to file an *amicus* brief. That motion had not been granted at the time of oral argument in May 2009. The motion was not granted until the date of the decision under review, by order of even date deeming its brief filed.

The Court of Appeals noted that the *Winter Storm* Rule had "produced a body of critical commentary," and that "some have even suggested that *Winter Storm* has threatened the usefulness of

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[4] Jaldhi also cross-appealed the District Court's denial of counter-security based on the Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1602-1611.

the dollar in international transactions" and "New York's standing as a center of international banking and finance." Pet. App. 4a-6a (citations and quotations omitted). Recognizing that "it would ordinarily be neither appropriate nor possible for us to reverse an existing Circuit precedent," Pet. App. 18a-19a, the court stated that it had employed what it referred to "as a mini-en banc" process of circulating its opinion "to all active members of this Court prior to filing" without objection, Pet. App. 19a n.9.

Contrary to Judge Cardozo's comments on the "situs of intangibles", *supra*, and this Court's lessons on the importance of maritime attachment, *see, e.g., Manro*, 23 U.S. at 487, *supra* at 6, the Second Circuit stated that it was "unaware of any historical rationale that justifies the extension of federal maritime common law to support the Rule B practices that have taken place under the rule of *Winter Storm*", *i.e.*, to "this wired age." Pet. App. 25a. It then considered that "[w]here there is no federal maritime law to guide our decision, we generally look to state law to determine property rights." Pet. App. 26a (citations omitted). That resort led to a pre-ordained result, as *amicus* had been urging.

The Second Circuit reasoned that reversal of *Winter Storm et al.* was appropriate because "New York State does not permit attachment of EFTs that are in the possession of an intermediary bank" and "the New York Uniform Commercial Code states that *a beneficiary has no property interest* in an EFT." Pet. App. 28a (emphasis added). The court concluded:

> Because EFTs in the temporary possession of an intermediary bank are not *property* of either the originator or the beneficiary under New York law, they cannot be subject to attachment under Rule B. . . . If the EFTs are not the *property* of either the originator or the beneficiary, then they cannot be "defendant's . . . *property*" and therefore are not subject to Rule B attachment.

Pet. App. 28a-29a (emphasis added) (second omission in source).

Accordingly, *Jaldhi* overruled *Winter Storm* and clarified that by so doing "we also abrogate any decision insofar as it has relied on *Winter Storm*, specifically [*Consub Delaware*]." Pet. App. 4a n.3.

The remanded issue of whether "there are other grounds for not vacating" the EFTs originated by Jaldhi was summarily dealt with, prior to briefing, by the District Court's further order vacating those attachments.

REASONS FOR GRANTING THE PETITION

The Second Circuit recognized that its decision in *Jaldhi* "[o]verturning *Winter Storm* will dramatically affect the law of maritime attachments in our Circuit." Pet. App. 8a. The import of the decision goes well beyond that and the Second Circuit. As discussed below, and in *Winter Storm*, 310 F.3d at 267-268:

> As early as 1825, the Supreme Court was able to say of the right of attachment in *in personam* admiralty cases that "this Court has entertained such suits too often, without hesitation, to permit the right now to be questioned." *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, 486, 6 L. Ed. 369 (1825). "Maritime attachment is a feature of admiralty jurisprudence that antedates both the congressional grant of admiralty jurisdiction to the federal district courts and the promulgation of the first Supreme Court Admiralty Rules in 1844." *Aurora Maritime Co. v. Abdullah Mohamed Falem & Co.*, 85 F.3d 44, 47 (2d Cir. 1996). Admiralty Rule B, quoted in part *supra*, contains the current provisions governing maritime attachment. "Rule B is simply an extension of this ancient practice." *Aurora*, 85 F.3d at 47-48.

That right was explicitly "questioned" and materially prejudiced by the decision below. In failing to acknowledge the reality of modern maritime commerce, which relies on the use of dollar EFTs for transacting payments as much as the internet for communications, and by improperly resorting to State law based on "critical commentary" of the rules' "unfavorable" consequences, Pet. App. 4a-8a, *Jaldhi* has undermined the ancient maritime remedy of attachment and has effectively limited its reach. The decision must be reviewed because it is an unconstitutional and destructive of uniformity.

The body of federal precedent that has developed over centuries to determine the type of property and kind of interest, both "tangible and intangible", as provided for and protected by Rule B, does not require "default" reference to State law. To the contrary, such resort to State law to determine the scope of this ancient remedy is an impermissible derogation of the Constitutional protection of admiralty matters under the Admiralty Clause, U.S. Const. art. III, § 2, as well as the Supremacy Clause, U.S. Const. art. VI. It is also contrary to the requirement that the "Federal Rules should be given their plain meaning," *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 (1980), and "intangible property" an interpretation consistent with the expansive intention of these words, *see Winter Storm*, 310 F.3d at 276 ("It is difficult to imagine words more broadly inclusive...").

The Clearing House Association, which operates the Clearing House Interbank Payments System ("CHIPS") is based in New York and its member banks process over 95% of cross-border U.S. dollar transactions.[5] Accordingly, as a practical matter, the attachment of EFTs as "intangible property" under Rule B is a uniquely Second Circuit issue and remedy. There is not now and likely never will be a conflict between the Circuit courts as to the attachability of EFTs under Rule B for that reason. The Court, nevertheless, must review the constitutionality of *Jaldhi* under the Constitutional principles and precedent[6] cited in *Exxon Shipping*

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[5] *See* www.chips.org/home.php.

[6] *Citing* U.S Const. art. III § 2, cl. 1; *see, e.g., Edmonds v Compagnie Generale Transatlantique*, 443 U.S 256, 259 (1979)

Co. v. Baker, 554 U.S. ___, 128 S. Ct. 2605, 2620, 171 L. Ed. 2d 570, 584 (2008) where the Court stated:

> . . . we are acting here in the position of a common law court of last review, faced with the perceived defect in a common law remedy.

128 S. Ct. at 2629, 171 L. Ed. 2d at 594.

THE SECOND CIRCUIT IMPERMISSIBLY APPLIED STATE LAW TO WORK MATERIAL PREJUDICE TO THE ANCIENT MARITIME REMEDY OF ATTACHMENT

In *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917), the Court stated, after examining Mr. Justice Bradley's ruling for the Court in *The Lottawanna*, 88 U.S. 558 (1875):

> In view of these constitutional provisions [U.S. Const. art. III, § 2 and art. I, § 8] and the federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. . . . And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by act of Congress or

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("Admiralty law is judge-made law to a great extent"); *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 360-361 (1959) (constitutional grant "empowered the federal courts . to consider the development of [maritime] law").

> works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purpose for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from *The Lottawanna*.

Id. (emphasis added).

The "quotations" referred to from *The Lottawanna*, 88 U.S. at 574-575, were:

> That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." . . .
>
> One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole

> country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

Id. (emphasis added).

The Constitution commands that maritime matters be governed by federal law, not that of the "several States." U.S. Const. art. III, § 2; U.S. Const. art. I, § 8, cl. 3.

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 155 (1920) addressed an award to the widow of a drowned bargeman under the Workman's Compensation Law of New York. The Court reviewed its earlier decisions in, *inter alia, Southern Pacific Co.*, 244 U.S. at 217-18 (invalidating New York's Workmen's Compensation Act as unconstitutional); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 382 (1918) (declining to permit a seaman to apply state law providing for greater damages in his personal injury action against his employer); *Union Fish Co. v. Erickson*, 248 U.S. 308, 314 (1919) (declining to apply California statute to invalidate maritime contract) and concluded:

> Since the beginning, federal courts have recognized and applied rules and principles of maritime law as something

> distinct from laws of the several states – not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered were distinctly pointed out long ago.

253 U.S. at 160-161; *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 741-42 (1961) (refusing to apply New York's Statute of Frauds to seaman's breach of contract claim since Supremacy Clause, U.S. Const art. VI, carries with it the implication that wherever a maritime interest is involved, that interest displaces a local interest no matter how significant); *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924) (purpose of the "framers of the Constitution" was "to place the entire subject – its substantive as well as its procedural features – under national control because of its intimate relation to navigation and to interstate and foreign commerce"). *See generally Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 210 (1996) (observing that "in several contexts, we have recognized that vindication of maritime policies demanded uniform adherence to a federal rule of decision, with no leeway for variation or supplementation by state law"); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244 n.10 (1942) (noting that "[i]n many other cases this Court has declared the necessary dominance of admiralty principles in actions in vindication of rights arising from admiralty law") (both collecting cases).

This principle was re-affirmed by this Court in *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994), and again recently in *Norfolk Southern Ry. v.*

James N. Kirby, Pty Ltd., 543 U.S. 14, 28 (2004). In *Exxon Shipping Co. v. Baker*, 554 U.S. ___, 128 S. Ct. 2605, 2630 n.21, 171 L. Ed.2d 570, 595 n.21 (2008) the Court stated that "modern-day maritime cases" "support judicial action to modify a common law landscape largely of our own making" and added:

> The character of maritime law as a mixture of statutes and judicial standards, "an amalgam of traditional common-law rules, modifications of those rules, and newly created rules," *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 865, 106 S. Ct. 2295, 90 L. Ed 2d 865 (1986), accounts for the large part we have taken in working out the governing maritime tort principles.
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> * * *
>
> And for the very reason that our exercise of maritime jurisdiction has reached to creating new causes of action on more than one occasion, it follows that we have a free hand in dealing with an issue that is "entirely a remedial matter."
>
> * * *
>
> ". . . But the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and Congress has largely left to this Court the responsibility for fashioning

> the controlling rules of admiralty law" [quoting *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975)].
>
> * * *
>
> Where there is a need for a new remedial maritime rule, past precedent argues for our setting a judicially derived standard, subject of course to congressional revision.

Id. (citations and internal quotations omitted).

Jaldhi is in conflict with this Court's long line of precedent concerning the invalidity of state legislation which "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Southern Pacific Co. v. Jensen*, 244 U.S. at 216.

More than any other Circuit decision relating to maritime attachment in the last fifty years, *Jaldhi* merits review by this Court so that the Court may fashion a rule of attachability of "intangible" property consistent with the historical purpose of maritime attachment of "intangible property" in this "wired age", and to prevent the default to inapplicable and potentially inconsistent State law that would disrupt the uniformity necessary to the smooth functioning of maritime commerce. *See, e.g.*, *U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 391 (3d Cir. 2002) ("the area of maritime attachments [is] a subject of particular concern to the

federal courts, and one where national uniformity is of some importance.")

JALDHI DESTROYS UNIFORMITY

Even if all fifty states adopted identical versions of N.Y.U.C.C. Article 4-A, Pet. App. D, (which has not happened), application of State law would still disrupt the necessary uniformity in the availability of maritime attachments. *See generally* Norman Silber, *Why the U.C.C. Should Not Subordinate Itself to Federal Authority: Imperfect Uniformity, Improper Delegation and Revised Section 3-102(c)*, 55 U. Pitt. L. Rev. 442, 452-53, 456-57, 459-60, nn.72, 134, 139 & 142 (1994) (discussing the deliberate choice made to enact a fifty-state statute rather than a federal statute so that, if desired, states could depart from the standard); *see also* Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea*, 26 J. Mar. L. & Comm. 553, 567 (1995) (discussing how apparent uniformity-adoption of the same text-quickly degenerates into inconsistency); Albert H. Conrad, Jr. & Richard P. Kessler, Jr., *Proposed Revisions to the Georgia Uniform Commercial Code: A Status Report*, 43 Mercer L. Rev. 887, 898 & nn.80, 899 (1992) (uniform law approaches have been insufficiently responsive to emerging technologies, economic considerations, and consumer protection needs, and such responsiveness can only be achieved through federal action).

As the Court of Appeals recognized in *Aurora Maritime Co. v. Abdullah Mohamed Falem & Co.*, 85 F.3d 44, 48-49 (2d Cir. 1996):

> [L]eaving the functional usefulness of Rule B attachments to the vagaries of the laws of the fifty states would create a measure of anarchy . . . inconsistent with an ancient purpose of admiralty law . . . [and] detrimental to international commerce.

The Admiralty Rules, including Rule B, are a necessary feature of the federal procedural rules adopted pursuant to the Rules Enabling Act of 1934, and to the extent that Rule B conflicts with State law, such as the N.Y.U.C.C., the latter cannot be applied, as in *Jaldhi*, to "abrogate" the former.

Moreover, in accordance with the general rule that the UCC is displaced by federal law in cases involving federal subject matter,[7] the drafters of UCC Article 4-A anticipated that conflicts would arise between Article 4-A and federal law and that federal law would prevail in such cases. For example, in comment 3 to § 4-A-107, the UCC drafters noted that "federal preemption would make ineffective any Article 4-A provision that conflicts with federal law." *See* Thomas C. Baxter, Jr. & Raj

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[7] *See, e.g., N. Am. Phillips Corp. v Emery Air Freight Corp*, 579 F 2d 229, 233-34 (2d Cir 1978) (federal law preempts all state law in interstate shipments); *Nat'l Garment Co. v N.Y., Chi & St. Louis R.R. Co*, 173 F.2d 32, 35 (8th Cir 1949) (federal law preempts state law in interpreting bills of lading); *Starmakers Pub. Corp. v. Acme Fast Freight, Inc*, 615 F Supp 787, 791 (S.D.N.Y. 1985) (Interstate Commerce Act, not the UCC, governs interstate shipments); *Rio Grand Motor Way, Inc. v. Resort Graphics, Inc*, 740 P.2d 517, 520 (Colo. 1987) (federal law preempts conflicting state UCC law on warehouseman's liens).

Bhala, *The Interrelationship of Article 4-A with Other Law*, 45 Bus. Law. 1485, 1493 (1990).

The relevant sections of N.Y.U.C.C. Article 4-A are in direct conflict with Rule B because they would prohibit the federal courts from exercising powers conferred by Rule B in two respects: (1) by preventing courts from issuing restraining orders to certain garnishees, even if it were impossible at the commencement of suit to determine the status of a garnishee in the relevant transaction (N.Y.U.C.C. § 4-A-503) and, even though Rule B contains no such prohibition, and (2) if a court nevertheless issued a Rule B attachment order, by sometimes excusing garnishees from compliance (*Id.* § 4-A-502) when they would otherwise be subject to contempt sanctions for disobedience, thus compromising the authority of an admiralty court to enforce its orders.

As this Court explained in *Hanna v. Plumer*, 380 U.S. 460, 473-74 (1965): "[t]o hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act."

Reading Rule B without resort to state law does not create any new substantive rights because maritime plaintiffs have always had a right to attach the tangible and intangible property of maritime defendants, wherever and in nearly whatever form it may be found in the district. *Jaldhi*'s reliance on N.Y.U.C.C. to deny that right cannot be left unreviewed, and it is this Court that has the last

word in the development of this ancient remedy in the Twenty-First Century. Review and reinstatement of the *Winter Storm* Rule by the Court would be in keeping with its role of "formulating flexible and fair remedies in the law maritime." United States v. Reliable Transfer Co., 421 U.S. 397, 409 (1975); *see also supra* at 23-24.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JEREMY J.O. HARWOOD
BLANK ROME LLP
405 Lexington Avenue
New York, NY 10174
(212) 885-5000

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Counsel for Petitioner
The Shipping Corporation of India, Ltd.